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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. .....

LOUIS C. MIRIANI,
Petitioner,

—against—

UNITED STATES OF AMERICA,
Respondent.

PETITION AND APPENDIX FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner Louis C. Miriani requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, dated February 20, 1970.

OPINION BELOW

The opinion of the United States Court of Appeals is printed in the Appendix to this petition (A 19).* It is not as yet reported. There was no opinion in the United States District Court.

Nor did the Court of Appeals write an opinion in denying the petition for rehearing.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Does it constitute income tax fraud for a political office holder not to report as income unexpended political gifts and contributions which he has set aside in municipal bonds and savings accounts for future political use?

2. Can a prosecution for the non-reporting as income unspent political gifts and contributions set aside for future political use, be based solely on a revenue ruling, which ruling holds as taxable the receipt of political funds, when diverted to personal use?

3. Is it a constitutional violation for a Special Agent of the Internal Revenue Service, in the course of a crimi-

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* References to the Appendix will be preceded by the letter "A". All references without such designation shall be to petitioner's Appendix in the Court of Appeals, except in one instance where specific reference is made to the trial transcript.

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nal investigation, not to advise the taxpayer, as required by *Miranda* (384 U.S. 436) and *Mathis* (391 U.S. 1), prior to interrogating him, that they are engaged in a criminal investigation of his tax returns, and that he has the right to counsel and the right to decline to answer questions?

4. Was the petitioner denied due process, when, without any evidence appearing in the record, and after the Government had erroneously and improperly referred to the petitioner as a taker of bribes, the Trial Court instructed the jury to consider the probabilities that petitioner had received these contributions for favors done or to be done?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The case involves the due process and the privilege against self-incrimination clauses of the Fifth Amendment, and the right to counsel clause of the Sixth Amendment; Title 26 U.S. Code §7201; Rule 52(b) F.R.C.P. and I.R. Ruling 54-80. The appropriate portions of the text of these provisions are printed in the Appendix.

STATEMENT

Petitioner, Louis C. Miriani, was convicted of income tax fraud, with regard to the reporting of his income for the years 1959, 1960, 1961 and 1962.

During the years in question, Miriani was Mayor of the City of Detroit. He did pay the appropriate taxes due on salary, dividends and interest he received.

However, the Government claimed that Miriani failed to report political gifts and contributions above those spent in the years of receipt, which gifts and contributions had been set aside in municipal bonds and savings accounts for use in future political campaigns. Essentially, this was a net worth case, with the Government showing that Miriani's assets had increased substantially during the years in question. There was no showing or contention that Miriani had adopted luxurious living beyond the limits of his municipal salary, or that he had acquired personal items of affluence.

In fact, there was no real dispute that the funds represented surplus political gifts and contributions accumulated over the several years. Nor did the Government evidence show that any of the political gifts and contributions arose from any improper act or conduct, from bribery or corruption.

It was the Government's contention that unspent political gifts and contributions, when diverted to personal use, constitute reportable income. The defense contended that the funds were never diverted to personal use, but were clearly set aside for later political use. All of the unspent moneys were still in existence at the time of the trial in the form of bonds and savings accounts.

During the criminal investigation of Miriani's tax affairs, a Special Agent of the Intelligence Division (Criminal Investigation Unit) of the Internal Revenue Service questioned him at length on several occasions. Prior to the appearance of counsel Miriani gave substantial details as to his financial affairs, and produced his past tax returns and records of acquisition of municipal bonds. The agent's testimony of Miriani's admissions, together with the records he produced, formed the bulk of the Government's case.

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The trial Court refused to rule on the claim that the Special Agent did not advise Miriani that he was engaged in a criminal investigation of his financial affairs, nor on the claim that the agent should have advised him of his right to counsel, his right to silence, and that his statements would be used as evidence against him in a criminal trial. Both the Court of Appeals and the District Court maintained that since Miriani was not in custody, there was no obligation for the tax agent to so advise him.

During the trial, both the Court in its instructions, and the Government in summation, referred to bribe taking and corruption by Miriani when the evidentiary record was absolutely devoid of any such wrongdoing. The evidence showed only that Miriani had acquired bonds and savings accounts, and that he had received political gifts and contributions.

REASONS FOR GRANTING THE WRIT

As to questions 1 and 2:

It is not a crime to fail to report as income unspent political gifts and contributions set aside for future political use.

A revenue ruling cannot have the force and effect of statute.

The evidence established that Miriani, as Mayor of Detroit received political gifts and contributions in excess of what he expended, and that he set aside such excess funds in municipal bonds and savings accounts.

The trial was conducted on the theory that Revenue Ruling 54-80 taxes funds contributed to a political campaign, and diverted to personal use (A 28). There was no evi-

dence or even suggestion that he personally used any such funds.

In its opinion the Court of Appeals stated (A 21):

> "First, defendant contends that the failure to report unspent but accumulated political contributions cannot support a conviction for tax fraud as Revenue Ruling 54-80, which declares that such funds when diverted to personal use are taxable, does not have the force of law. It has been firmly established, however, that this Revenue Ruling is declaratory of judicial interpretation of existing law that funds contributed to a political campaign and diverted to personal use are taxable."

As such the opinion of the Court of Appeals is in conflict with the series of decisions of this Court consistently holding that a Revenue Ruling or administrative position does not have the force or effect of law. *Helvering v. U.S. Trust Co.*, 295 U.S. 455, 468; *Biddle v. Commissioner*, 302 U.S. 573, 582; *Sanford's Estate v. Commissioner*, 308 U.S. 39, 52; *Dixon v. U.S.*, 381 U.S. 68.

In *Dixon*, 381 U.S. at 73-74, Mr. Justice Brennan wrote:

> "• • • This principle is no more than a reflection of the fact that Congress, not the Commissioner, prescribes the tax laws. The Commissioner's rulings have only such force as Congress chooses to give them, and Congress has not given them the force of law.
>
> • • • • • •
>
> 'the rulings other than Treasury Decisions have none of the force or effect of Treasury Decisions and *do not commit the Department to any interpretation of the law which has not been formerly approved and promulgated by the Secretary of the Treasury.*' (Emphasis added)
>
> • • • • •

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> Indeed, long before the tax year here in question this Court had made it clear that 'The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law . . . but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.'"

Furthermore, the opinion of the Court of Appeals, is in conflict with *U.S. v. Laub*, 385 U.S. 475, which prohibits administrative regulations from being the basis of criminal prosecutions. Only a Congressional Statute may serve as the foundation for a criminal indictment and conviction. Article 1, Section 8, United States Constitution.

Essentially we are dealing with an area—political contributions—in which Congress has not spelled out the guidelines. Nor has the Internal Revenue Service defined the applicable rules by regulations having legislative authority. Of course the personal diversion of funds, no matter what the source, constitutes taxable income to the recipient, as stated in *O'Dwyer, Jett, Paschen*, cited by the Court of Appeals. Likewise the receipt of ill-gotten money. But what about the setting aside of funds for future use? What should a political person do with sums in excess of his immediate needs? Is this a problem to be resolved by the courts within the context of a criminal case, such as ours? If so, what are the rules of the game? Surely a Revenue Ruling or an administrative pronouncement cannot serve as the basis for a criminal proceeding. As yet, no court has stated that it is a crime to fail to report political gifts and contributions held for future use.

As such the opinion of the Court of Appeals is contrary to the holding of the decision of this Court in *Viereck v. U.S.*, 318 U.S. 236, 241, in which it was stated "One may be

subjected to punishment for crime in the Federal Courts only for the commission or omission of an act defined by statute, or by regulation having legislative authority, and then only if punishment is authorized by Congress."

It is in order for the Court to consider the problem of political contributions. After all it affects countless seekers of public office. Should this be a matter for the courts, or is it basically a legislative problem? If it is initially a matter for the Congress, then there can be no crime until Congress creates one. As this Court stated in *McDonald v. Commissioner*, 323 U.S. 57, 63 (1944):

> "It is not for this Court to initiate policies as to the deduction of campaign expenses. It is for Congress to determine the relation of campaign expenditures to tax deductions by candidates for public office, under such circumstances and within such limits as commend themselves to its judgment.
>
> * * * * *
>
> The relation between money and politics generally—and more particularly the cost of campaigns and contributions by prospective officeholders, especially judges—involves issues of far-reaching importance to a democracy and is beset with legislative difficulties that even judges can appreciate."

The grant of review in this case can be an important initial step in the development of a much needed body of law.

Necessity for Uniform Treatment of Similar Matters

Between the time of argument and the date of affirmance by the Court of Appeals, the Department of Justice made a public announcement in a matter of marked similar circumstances to our case. The Department of Justice concluded that Senator Dodd, who had received and used for his own personal purposes substantial proceeds which came from a number of political dinners, had not committed a criminal offense under the Internal Revenue Code by failing to report the receipt of such funds. The media advised that the sums involved ran over $100,000 and had not been reported as income in the Senator's tax return. This created what seems to be a clear instance of funds which came from political gifts, contributions and dinners, not set aside for future political use, but actually spent for personal use and therefore "diverted" according to Revenue Ruling 54-80 (A 28)—the Ruling discussed under this heading, yet no criminal prosecution was recommended or ordered.

Upon our rehearing application, we requested the Department of Justice to submit a memorandum to the Court of Appeals explaining this apparent discrepancy. We also asked the Court of Appeals to request a brief from the Department of Justice on this point under Rule 40(a) F.R.A.P. The motion for rehearing was denied and no brief was furnished by the Department of Justice, nor was any request for the brief made by the Court of Appeals.

It is clearly in order for the Justice Department to state to this Court how they can assert a claim of criminal liability by Miriani and at the same time maintain that Dodd did not transgress the same law.

After the denial of rehearing, we wrote the Attorney General and the Solicitor General, requesting a copy of the opinion or memorandum in the Dodd matter. It was refused, essentially upon the ground that office memoranda were not matters which could be released to the general public. However, a press release had been issued.

The Attorney General and the Solicitor General are respectfully urged to submit to this Court such parts of the Dodd ruling or decision which are pertinent to the legal issues raised here.

Unfortunately, the issues that the proof did not establish a recognizable crime under the Internal Revenue Code, and that Revenue Ruling 54-80 did not have the force and effect of statute, were not raised in the District Court. The Court of Appeals discussed these matters, commenting on failure to make objection. Our brief before the Court of Appeals raised the provisions of Rule 52(b) of the Federal Rules of Criminal Procedure (A 27).

Matters of genuine importance, such as the issue of whether the conduct in question actually constitutes a crime, can still be considered by the Supreme Court, under these circumstances. *U.S. v. Atkinson,* 297 U.S. 157, 160 (1936); *United Brotherhood of Carpenters and Joiners of America v. U.S.,* 330 U.S. 395, 411-412 (1947); *Hormel v. Helvering,* 312 U.S. 552, 556 (1941).

Unfortunately, in *Jett,* 352 F2d 179, cited by the Court of Appeals, the defense erroneously conceded the Government position that a revenue ruling has the force and effect of law. As such the certiorari petition did not present this Court with the issue we now raise (cert. denied, 383 U.S. 935).

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As to question 3:

Miranda and Mathis warnings are required from Special Agents of the Internal Revenue Service.

The opinion of the Court of Appeals holding that there is no requirement that a taxpayer under investigation be warned by Internal Revenue Service agents of his constitutional rights before his statements to their interrogation may be received in evidence, is in direct conflict with the opinion of a sister Circuit, the Seventh, which held in *U.S. v. Dickerson,* 413 F2d 1111, that there is such a constitutional right.

In our case, the Court of Appeals wrote:

> "The defendant was never in custody when being interrogated by the agents of the Internal Revenue Service. Where a person is not under arrest or under duress in the legal sense of the term, it is not necessary to the admission of his statements in evidence that he be warned of his constitutional rights by the agents interviewing him . . . and this is true even when the examination for the purpose of determining civil tax liability takes on criminal aspects."

In *Dickerson,* in holding that the warning of constitutional rights must precede the questioning by the tax agents, the Court of Appeals for the Seventh Circuit stated (413 F2d at 1116, 1117):

> "Incriminating statements elicited in reliance upon the taxpayer's misapprehension as to the nature of the inquiry, his obligation to respond, and the possible consequences of doing so must be regarded as equally violative of constitutional protections as a custodial confession extracted without proper warnings.
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> • • • • •

> Under such circumstances, it is imperative that the taxpayer be advised that he is the subject of a criminal investigation and that he need not answer questions put to him by the agents.
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> • • • • •
>
> Our conclusion is that Miranda warnings must be given to the taxpayer by either the revenue agent or the special agent at the inception of the first contact with the taxpayer after the case has been transferred to the Intelligence Division."

The Court of Appeals of other Circuits are in accord with the Sixth Circuit. See *U.S. v. Spinney,* 385 F2d 908 (First Cir.); *U.S. v. Mackiewicz,* 401 F2d 219 (Second Cir.); *U.S. v. Mancuso,* 378 F2d 612 (Fourth Cir.); *U.S. v. Muse,* 405 F2d 40 (Eighth Cir.); *U.S. v. Kohatsu,* 351 F2d 898 (Ninth Cir.); *U.S. v. Hensley,* 406 F2d 481 (Tenth Cir.).

In contrast, in *Dickerson,* the Court of Appeals for the Seventh Circuit was motivated not only by several decisions of District Courts within its own Circuit, but also by District Court opinions from three other Districts (and Circuits), and also by two tax court opinions. See fn. 6, 413 F2d at 1114.

In *U.S. v. Browney,* 421 F2d 48, 52 (CA-4), in a concurring opinion, Judge Sobeloff stated "While I am aware that Dickerson is not in the mainstream of past decisions, ... I nevertheless find it persuasively reasoned."

Apparently the opinion of this Court in *U.S. v. Mathis,* 391 U.S. 1, has stimulated the debate and the disagreement among the various courts. Was it the tax agent's questioning or the custody problem which prompted this Court to exclude the taxpayer's admissions?

With one stroke of the pen this Court can resolve two problems. It can settle the conflict within the Circuits, and

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it can clarify its position as to *Mathis*. Countless investigations are regularly faced with the problem—what should the special agent tell the taxpayer? Until this matter is clarified, once and for all each such investigation will proceed with an air of uncertainty. Tax Agents will proceed with caution or with risk that perhaps some time in the future their labors may be negated.

Apparently the Internal Revenue Service has recognized the problem for it has issued directions to its Special Agents in October 1967 to give the Miranda warnings to taxpayers under investigation. I.R.S. Release No. 897; 7 CCH ¶ 6382 (1967) (set forth in 420 F2d at 811). However, *U.S. v. Heffner,* 420 F2d 809, 811 (CA-4, 1969) is a good illustration showing agents do not always follow office procedures. However, this issue is of constitutional proportion, warranting pronouncement by this Court and should not depend upon the generosity of the Internal Revenue Service and its many and changing regulations.

Furthermore, Miranda warnings are applicable as to trials conducted after June 1966. *Johnson v. New Jersey,* 384 U.S. 719 (1966). Miriani's trial was held in May 1968, long after both Miranda and the I.R.S. directions.

As to question 4:

Trial Court's instructions and Government's arguments not based upon evidence, creates a denial of "due process".

Both the trial Court's instructions and the Government summation told the jury that Miriani was a taker of bribes, when in fact the record does not show any such impropriety.

It was the Government's obligation to show a likely source of the moneys received by Miriani. Into the courtroom they paraded a series of admirers, each of whom testified he gave a political gift or contribution to Miriani, solely out of consideration of respect and friendship. No witness even suggested he expected anything in return. Also the Government introduced evidence as to the proceeds of political dinners, attended by friends and admirers.

Nevertheless the Court charged:

> "But there is another aspect of American politics, however. If it can be characterized in a cliché, such is dominated by a so called '*quid pro quo*' intention, 'this is for that,' 'something for something', 'what for whom,' 'you scratched my back, now I'll scratch yours,' or 'I scratched your back, now I expect you to scratch mine.' This facet of politics may manifest itself in many forms: Money contributed for past favors or preferment, not in appreciation, but as compensation for what was done; money contributed on the promise/or in the expectation or hope of future favor or preferment, not in appreciation, but as compensation for what is to be, expected to be, or hoped to be done. This may relate to a specific favor or preferment or favors and preferment not as yet determined or

even conceived, but only to favor or preferment whatever may be the situation that may develop. It may also be entirely negative in nature, so that the donor may be left to his lawful devices without bother." (339a-340a)

Earlier the prosecutor had stated in summation:

"* * * it is a case of a man who has bargained his integrity to amass a personal fortune. He was willing to sell out the persons who supported him in order for him to clip coupons off municipal bonds, check his stock in the paper in the morning, and watch his balance grow." (319a)

"Is it any wonder that politicians are viewed so suspiciously by people, when a Mayor of a City like Detroit of approximately two million people is willing to use his high office for his own personal gain." (319a)

Later the Government attorney stated:

"How many more people are there walking the streets of Detroit today who contributed in 1957, and who will never know about it who may have given cash or check" (Trial Transcript Vol. IX, p. 12).

And finally, the prosecutor said:

"Members of the jury, it is seldom that an American jury has the opportunity to pull the reins in on a politician except at the voting polls. You have here the opportunity to tell, not only Mr. Miriani, but every other politician who runs for public office that public office is a public trust and not an office to make a fortune while you are serving the people" (320a).

The Court of Appeals stated: (A 22):

> "We have examined the record and find that the jury was adequately instructed. Again no objections were made to the challenged instructions as required by Rule 30 of the Federal Rules of Criminal Procedure, and in the absence of plain error, the failure to object is fatal.
>
> * * * * *
>
> The third objection of the defendant is to that portion of the government's closing argument which suggests that the defendant was a recipient of bribes. Again, no objection was made by the defense and this issue should not now receive consideration on appeal. If defendant's counsel considered the language harmful, he could have made an objection and the court would then have been afforded the opportunity of correcting any erroneous impression that the fragment of the argument complained of may have invoked.
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> * * * * *
>
> We agree with the statment in the government's brief that 'the isolated portions of the summation now complained of, while they might just as well have been omitted, could not possibly have deprived appellant of a fair trial.'"

This Court should grant certiorari to reinforce the strict rules which must guide the trial of a net worth income tax fraud case. See *U.S. v. Holland,* 348 U.S. 121. The Government must not be allowed to bolster a dull trial, full of numerous uneventful financial transactions, lacking jury appeal, with unproven charges of bribe taking and political payoffs, when no such evidence exists. Net worth cases are to be tried on the basis of increase of assets and nondeductible expenditures, and on no other basis. It is doubly wrong when both the Court and the prosecution refer to bribe taking when none in fact exists in the record.

Holland reminds us that the trial Court must be particularly careful in the conduct of a net worth prosecution. The complexity of the problem is such that the Court must exercise great care and restraint. Close appellate scrutiny is necessary to assure that the taxpayer is confronted only with competent evidence of his financial affairs, and not unsupported prejudicial contentions. 348 U.S. 125, 129.

The record did show that Miriani was the recipient of substantial sums of money from gifts and contributions, outside of his regular income. In order to arouse the jury, it was unfair to suggest, without a supporting record, that such sums were illicitly acquired. Such comments, from both the Court and the prosecution, could serve only to disgrace Miriani in the eyes of the jury. The trial of net worth cases must be made to toe the line, and to be decided on the basis of cold facts, not improper suggestions.

The Court of Appeals did discuss the issue of the propriety of the Court's charge and the Government's summation, even though the matter was not raised by objection at the trial. However, this does not foreclose the Supreme Court from considering this issue, if it wishes. Rule 52(b), F.R.C.P.; *Viereck v. U.S.*, 318 U.S. 236, 248 (1943); *Atkinson, Hormel, United Brotherhood of Carpenters, supra; Screws v. U.S.*, 325 U.S. 91, 107 (1945).

An improper charge and an inflammatory summation, especially when coupled together on the same erroneous factor, have been condemned on occasion by this Court. *U.S. v. Berger*, 295 U.S. 78 (1935); *Viereck v. U.S.*, 318 U.S. 236, 248 (1943).

CONCLUSION

Under all the circumstances hereinabove set forth, it is respectfully prayed that the Writ of Certiorari should be granted

Respectfully submitted,

GEORGE S. FITZGERALD
Attorney for Petitioner

HENRY G. SINGER and
H. ELLIOT WALES
Of Counsel

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS

No. 19274

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

United States of America, *Plaintiff-Appellee,* v. Louis C. Miriani, *Defendant-Appellant.*	Appeal from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided February 20, 1970.

Before: Weick, Combs and Brooks,* Circuit Judges.

Brooks, Circuit Judge. The defendant-appellant, Louis C. Miriani, was convicted by a jury on all counts of a four-count indictment charging him with attempting to evade and defeat a large part ($163,723.49) of his federal income taxes due for the years 1959 through 1962, in violation of 26 U.S.C. §7201. A sentence of a year and a day imprisonment and a fine of $40,000 was imposed.

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* The Honorable Henry L. Brooks, then Chief Judge of the United States District Court for the Western District of Kentucky, sat on this case by designation.

Six principal issues are raised on this appeal in seeking a reversal of the judgment but consideration of these issues and of the entire record establishes that the defendant received a fair trial and we affirm the judgment of conviction.

Defendant, a practicing lawyer for many years, was mayor of Detroit from 1956 through 1961. He was defeated in his bid for re-election in 1961 but was again elected to the City Council in 1965. Beginning in 1964 agents of the Internal Revenue Service held several conferences with defendant concerning the accuracy of his income tax returns, especially for the years in which he was mayor. During the period of investigation, defendant furnished the agents with certain information and on the basis of this information and other evidence, the government determined defendant's net worth to be $181,000 at the close of the 1956 tax year and that it had increased to $605,000 by the end of 1962.

The government's case was centered around establishing the accuracy of its net worth determinations and that the significant increase in net worth was due to unreported, but taxable, "political contributions" received by the defendant during the years in question. The defendant sought to demonstrate that any excess of net worth over reported income was due to cash on hand at the beginning point for establishing defendant's net worth, gifts received by him, and unspent political contributions which defendant had invested in municipal bonds and which allegedly were earmarked for later political use.

The evidence shows that the campaign statements filed by defendant as required by Michigan law failed to disclose any surplus campaign funds and, also, the names of several witnesses who testified they had made political contributions did not appear in this list. The defendant did

not take the stand, although he did call an attorney who testified he had advised defendant that surplus political funds could be set aside for future political use and would not be taxable. This same witness advised defendant to invest the funds in municipal bonds. The sufficiency of the government's evidence to support the jury verdict of guilty is not challenged on this appeal.

First, defendant contends that the failure to report unspent but accumulated political contributions cannot support a conviction for tax fraud as Revenue Ruling 54-80, which declares that such funds when diverted to personal use are taxable, does not have the force of law. It has been firmly established, however, that this Revenue Ruling is declaratory of judicial interpretation of existing law that funds contributed to a political campaign and diverted to personal use are taxable. *United States v. Jett,* 352 F.2d 179 (6th Cir. 1965), cert. denied, 383 U.S. 935; *O'Dwyer v. Commissioner,* 266 F.2d 575 (4th Cir. 1959), cert. denied, 361 U.S. 862; *Paschen v. United States,* 70 F.2d 491 (7th Cir. 1934). Moreover, this issue was not preserved for appellate review and it is only in exceptional cases where injustice might otherwise result that an issue not raised at the trial level will be considered on appeal. *Hormel v. Helvering,* 312 U.S. 512 (1941); *Dupes v. Johnson,* 353 F.2d 103 (6th Cir. 1965); *Wiper v. Great Lakes Engineering Works* 340 F.2d 727 (6th Cir. 1965), cert. denied, 382 U.S. 812; *City of Memphis v. Southern Bell Telephone and Telegraph Co.,* 316 F.2d 535 (6th Cir. 1963); *Petty v. Porter,* 322 F.2d 308 (6th Cir. 1963), cert. denied, 377 U.S. 948.

Secondly, the defendant makes certain objections to the instructions of the Court. Basically, the objections are twofold: (1) the alleged failure to properly distinguish between gifts and political contributions, and (2) that the statement to the effect that any payment made with the in-

tention that it be compensation for past or future favors or preferment was taxable insinuated to the jury that defendant took bribes when there was no such evidence in the case. We have examined the record and find that the jury was adequately instructed. Again, no objections were made to the now challenged instructions as required by Rule 30 of the Federal Rules of Criminal Procedure, and in the absence of plain error the failure to object is fatal. *Singer v. United States,* 380 U.S. 24 (1965); *Lopez v. United States,* 373 U.S. 427 (1962); *United States v. Little,* 391 F.2d 222 (6th Cir. 1968); *United States v. Dorsey,* 290 F.2d 893 (6th Cir. 1961), cert. denied, 368 U.S. 825; *Solomon v. United States,* 276 F.2d 669 (6th Cir. 1960), cert. denied, 364 U.S. 890, reh. denied, 364 U.S. 939.

The third objection of the defendant is to that portion of the government's closing argument which suggests that the defendant was a recipient of bribes. Again, no objection was made by the defense and this issue should not now receive consideration on appeal. If defendant's counsel considered the language harmful, he could have made an objection and the court would then have been afforded the opportunity of correcting any erroneous impression that the fragment of the argument complained of may have invoked. *United States v. Benson,* 389 F.2d 376 (6th Cir. 1968), cert. denied, 391 U.S. 903; *United States v. Lichota,* 351 F.2d 81 (6th Cir. 1965); cert. denied, 382 U.S. 1027, reh. denied, 383 U.S. 954; *United States v. Chamley,* 376 F.2d 57 (7th Cir. 1967), cert. denied, 389 U.S. 898; *United States v. Krantz,* 281 F.2d 581 (3rd Cir. 1960), cert. denied, 364 U.S. 941. We agree with the statement in the government brief that "the isolated portions of the summation now complained of, while they might just as well have been omitted, could not possibly have deprived appellant of a fair trial."

The fourth issue raised by the defendant is whether statements made by agents of the Internal Revenue Service during their conferences with him were properly received into evidence. Again, no objections to the admissibility of these statements were made by the defense and they should not now be considered on review. Moreover, the statements made by the defendant to the agents during these conferences were concededly admissible and the questions and statements of the agents were necessary to place defendant's statements in proper perspective. The hearsay rule excludes extrajudicial utterances only when offered to evidence the truth or falsity of the statements not when offered to show that the utterances were made. *United States v. Press,* 336 F.2d 1003 (2nd Cir. 1964), cert. denied, 379 U.S. 965, reh. denied, 380 U.S. 927; *Hicks v. United States,* 173 F.2d 570 (4th Cir. 1949), cert. denied, 337 U.S. 945; Wigmore, Evidence §1766 (1940 ed.).

Fifthly, the defendant contends that the court erred in failing to suppress the testimony of the defendant's conversation with the government agents during their conferences and the exhibits and leads derived from them. A full evidentiary hearing preceded the denial of the motion to suppress, at which numerous contentions were advanced by the defendant. As found by the District Court, all are without merit.

The defendant was never in custody when being interrogated by the agents of the Internal Revenue Service. Where a person is not under arrest or under duress in the legal sense of the term, it is not necessary to the admission of his statements in evidence that he be warned of his consitutional rights by the agents interviewing him. *United States v. Mains,* 378 F.2d 716 (6th Cir. 1967), cert. denied, 389 U.S. 905; *Morgan v. United States,* 377 F.2d 507 (1st Cir. 1967); *Spinney v. United States,* 385 F.2d 908 (1st Cir.

1967), cert. denied, 390 U.S. 921; *United States v. Squeri*, 398 F.2d 785 (2nd Cir. 1968); *United States v. Mancuso*, 378 F.2d 612 (4th Cir. 1967); cert. denied, 390 U.S. 955; *Muse v. United States*, 405 F.2d 40 (8th Cir. 1968), cert. denied, 393 U.S. 1117; *Hensley v. United States*, 406 F.2d 481 (10th Cir. 1968). And this is true even when the examination for the purpose of determining civil tax liability takes on criminal aspects. *United States v. Sclafani*, 265 F.2d 408 (2nd Cir. 1959), cert. denied, 360 U.S 918; *United States v. Frank*, 245 F.2d 284 (3rd Cir. 1957), cert. denied, 355 U.S. 819; *Biggs v. United States*, 246 F.2d 40 (6th Cir. 1957), cert. denied, 355 U.S. 922. But, *Cf. United States v. Dickerson*, 43 F.2d 1111 (7th Cir. 1969).

Defendant also complains that without his knowledge tape recordings were made of his interviews with the Treasury agents. These taped interviews were held in government offices so there was no unlawful invasion of defendant's premises under circumtances that would violate the Fifth Amendment, and there was no electronic eavesdropping on private conversations which government agents could not otherwise have overheard. Therefore, under the circumstances, there was no invasion of contitutionally protected rights or violation of federal law. *Lopez v. United States*, 373 U.S. 427 (1963); *On Lee v. United States*, 343 U.S. 747 (1952); *Goldman v. United States*, 316 U.S. 129 (1942).

Defendant also argued before trial that he was not physically and mentally capable of testifying or assisting in his defense and moved for a continuance. One continuance had already been granted but a full evidentiary hearing on the second motion was conducted and the continuance was then denied. A trial judge is vested with wide discretion in ruling upon motions for continuances and his ruling will not be disturbed except in a case of clear abuse. *Avery v.*

Alabama, 308 U.S. 444 (1940); *United States v. Decker*, 304 F.2d 702 (6th Cir. 1962); *United States v. Koenig*, 300 F.2d 377 (6th Cir. 1962); *Adams v. United States*, 128 F.2d 820 (5th Cir. 1942), *cert, denied*, 317 U.S. 632.

The judgment is affirmed.

APPENDIX B

JUDGMENT OF COURT OF APPEALS

UNITED STATES COURT OF APPEALS
for the Sixth Circuit

No. 19,274

United States of America,
Plaintiff-Appellee,
vs.
Louis C. Miriani,
Defendant-Appellant.

Before: Weick, Combs and Brooks, Circuit Judges.

JUDGMENT

(Filed February 20, 1970

Appeal from the United States District Court for the Eastern District of Michigan.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Michigan and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 39(b).

Entered by order of the Court.

/s/ Carl W. Reuss
Clerk

APPENDIX C
ORDER DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
for the Sixth Circuit

No. 19,274

United States of America,
Plaintiff-Appellee,
vs.
Louis C. Miriani,
Defendant-Appellant.

The motion for rehearing filed by the defendant-appellant, Louis C. Miriani, has been considered and it is denied.

Entered by Order of the Court.

Carl W. Reuss
Clerk

Filed April 9, 1969.

APPENDIX D

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

Constitution

Fifth Amendment:

"No person • • • shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; • • •."

Sixth Amendment:

"In all criminal prosecutions, the accused shall enjoy the right • • • to have the Assistance of Counsel for his defense."

Statutes

Title 26 U.S.C. §7201

§7201. ATTEMPT TO EVADE OR DEFEAT TAX

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution. (Aug. 16, 1954, c.736, 68A Stat. 851)

Federal Rules of Criminal Procedure

Rule 52 • • •

(b) Plain error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

APPENDIX E

REVENUE RULING—54-80

"Where a political gift is received by an individual or a political organization and it is held or used for the purposes intended, i.e., for present or future expenses of a political campaign or for some similar purpose, it is not taxable income to the recipient. * * *

However, any amount diverted from the channel of campaign activities and used by a candidate or other individuals for personal use constitutes taxable income to such candidate or other individual for the years in which the funds are so diverted.

For example, that a candidate seeking political office receives contributions totaling $1,000.00 from individuals and organizations for use in his campaign for an election to such office. During the campaigning the candidate expends $600.00 of the contributed funds for campaign purposes. He uses the balance of the campaign funds to reduce the mortgage on his personal residence. In such a case the candidate will be required to include in his taxable income the $400.00 which represents the portion of the funds which he diverted to his personal use. Such amount will be included in taxable income in the year in which so diverted."

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1546

LOUIS C. MIRIANI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 19–25) is reported at 422 F. 2d 150.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 1970 (Pet. App. 25). A petition for rehearing was denied on April 9, 1970 (Pet. App. 26) and the petition for a writ of certiorari was filed on May 8, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether existing law supports a conviction for tax fraud where the evidence shows a taxpayer's fail-

ure to report taxable income, as stated in Revenue Ruling 54–80, on political contributions which have been diverted to his personal use.

2. Whether the trial court properly denied petitioner's motion to suppress pre-custody conversations with Treasury agents (and the fruits thereof) which took place without prior reference to the warnings prescribed in *Miranda* v. *Arizona,* 384 U.S. 436.

3. Whether statements by the prosecutor in his summation, and the instructions to the jury by the trial court, constituted plain error so as to warrant reversal of the conviction despite petitioner's failure to voice any objection at trial.

STATUTE INVOLVED

26 U.S.C. 7201. Attempt to evade or defeat tax.

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on all counts of a four-count indictment alleging he had wilfully attempted to evade and defeat his income tax for the years 1959 through 1962 by filing false and fraudulent income tax returns which understated in substantial amounts his true in-

come and tax. The court imposed a fine of $10,000 on each count and sentenced petitioner to consecutive 122-day prison terms on each of the first three counts (A.A. 367a).[1]

The evidence adduced at trial showed that petitioner, a lawyer who became Acting Mayor of the City of Detroit in 1956 and was elected to that office for a four-year term in 1957, prepared all his own income tax returns (A.A. 120a, 145a). The government demonstrated, on the basis of the net worth-expenditures method of determining income, that petitioner's net worth at the starting point, December 31, 1956, was $180,874.77; however, by the end of 1962, this figure had increased to $605,339.41 (Gov't. Ex. 153). It was shown that for each of the four prosecution years, petitioner understated his taxable income in the following amounts: 1959–$87,426.81; 1960—$30,217.49; 1961—$79,466.76; 1962—$29,818.49 (Gov't Ex. 153).[2] His undeposited cash on hand as of the end of each year was shown as $3,000 (A.A. 174a–178a).[3]

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[1] The designation "A.A." refers to Appellant's Appendix in the Court below. The designation "R." refers to the transcript of proceedings at the trial, and is always preceded by the volume number and followed by the page number.

[2] These understatements resulted in tax deficiencies in the following amounts: 1959—$56,253.41; 1960—$17,421.25; 1961—$50,942.66; 1962—$16,641.72 (Gov't Ex. 154).

[3] This was because (1) petitioner told the Treasury agents he had never had any more than that in undeposited cash on hand, and (2) a study of petitioner's reported income for the years 1927 through 1956, and his expenditures for those years, disclosed he could not have accumulated more than the $180,874.77 in net worth with which he was credited as of December 31, 1956 (A.A. 174a–178a).

Petitioner was first advised by Treasury agents on September 29, 1964 (A.A. 117a–118a) that a determination had been made that his net worth between 1957 and 1962 had increased more than his reported income would warrant (A.A. 132a). At that time, he denied ever receiving any gifts (A.A. 134a), claimed a relatively small inheritance of $10,000 from his father, and stated he had virtually no campaign funds in 1957 and very few political contributions in 1961 (A.A. 136a).[4] In subsequent meetings with the agents (A.A. 139a–140a, 140a–142a, 145a–147a, 163a–164a), however, petitioner asserted he had in fact received gifts in excess of $66,000 (A.A. 140a–142a, 147a), naming initially three persons as donors (A.A. 139a–140a), then later expanding the list to six persons (A.A. 140a–142a), and finally correcting it to include eight persons (seven of whom were no longer living) (A.A. 147a).[5]

During a later conference in the Tax Division, Department of Justice, petitioner's attorneys claimed the

[4] During the investigation petitioner told the Treasury agents that the campaign statements filed with the county government were accurate reports; that he had received very little in the way of campaign contributions in the 1961 campaign and that in fact he had to spend some of his own money on the campaign; and that he had made no profit from campaign contributions in 1961 (A.A. 120a, 136a). These statements were shown to be false. The government's proof showed that at least $21,735 was contributed to petitioner's 1961 campaign by donors whose names were not listed on the statements of campaign receipts and expenses filed with the county government. (2 R. 14–15, 17–18, 22–23, 28–29, 31–32, 35–36, 39–40, 42–43; 4 R. 97–98, 107–110, 113–114, 137–138; 5 R. 5–7, 11–12, 18–19, 45–48, 50–56, 57–60, 62–63, 65, 83–85, 86–90, 95–98).

[5] The one living donor testified at trial that he had never given money to petitioner personally, but had contributed a total of $4,900 to petitioner's political campaigns over the years (4 R. 129–131). This figure contrasted with the $14,000 figure petitioner alleged he received personally from this donor (A.A. 142a).

net worth increases (for the years 1959 through 1961) derived from gifts, campaign contributions and $100,000 of undeposited cash on hand at the beginning of 1957.

At trial, with only a passing reference (A.A. 212a) to the $100,000 cash on hand at the starting point, the defense attempted to account for the bulk of petitioners' unreported income on the theory that the funds in question (approximately $198,000), which had been invested by petitioner in municipal and Treasury bonds (Pet. App. 20), had not been diverted to personal use but were being held for possible use in future political campaigns (A.A. 279a, 294a–295a, 296a–297a). Petitioner did not testify.

ARGUMENT

1. Petitioner asserts "there was no real dispute that the funds represented surplus political gifts and contributions accumulated over the several years." (Pet. 4). The question whether these funds were in fact contributed to petitioner's political campaigns and diverted to his personal use was fully argued in the trial court and decided adversely to petitioner. As pointed out by the court below (Pet. App. 21), the "sufficiency of the government's evidence to support the jury verdict of guilty is not challenged on this appeal"; accordingly, this issue warrants no further consideration by this Court.

Petitioner contends here, as he did below (Pet. 5–8), that his failure to report as taxable income accumulated political contributions invested by him in municipal and Treasury bonds cannot support a conviction for tax fraud since Revenue Ruling 54–80

does not have the force of law. That a Revenue Ruling is merely an official interpretation by the Internal Revenue Service which has been published in the Internal Revenue Bulletin, 26 CFR 601.201 (a)(5), is not disputed. However, the case law was well settled, long before Revenue Ruling 54–80 was published, that funds contributed to a political campaign and diverted to personal use constitute taxable income. *United States* v. *Jett,* 352 F. 2d 179, 182 (C.A. 6), certiorari denied, 383 U.S. 935; *O'Dwyer* v. *Commissioner,* 266 F. 2d 575 (C.A. 4), certiorari denied, 361 U.S. 862; *Reichert* v. *Commissioner,* 19 T.C. 1027, affirmed on other grounds, 214 F. 2d 19 (C.A. 7), certiorari denied, 348 U.S. 909. As the court below correctly noted (Pet. 21), Revenue Ruling 54–80 was merely "declaratory of judicial interpretation of existing law." This judicial interpretation had a sound basis rooted in pronouncements of this Court to the effect that the broad sweep of the language of Section 61 (and its predecessors) indicates the purpose of Congress to use the full measure of its taxing power to tax income from whatever source derived. *Helvering* v. *Clifford,* 309 U.S. 331, 334; *Rutkin* v. *United States,* 343 U.S. 130, 139; *Commissioner* v. *Glenshaw Glass Co.,* 348 U.S. 426, 429. It would be an anomaly to hold that in taxing "all income from whatever source derived" (26 U.S.C. 61), Congress intended to exclude diverted political contributions, even though they are not listed among the designated statutory exclusions from income (26 U.S.C. 101 through 122). Moreover, it should be noted that this contention has not been properly preserved by petitioner for appellate review

but is a mere afterthought on appeal which was not raised at the trial (Pet. 10). There, petitioner's own expert witness admitted that when political contributions are diverted to personal use they become taxable income (8 R. 46).[6]

2. Petitioner next contends (Pet. 11–13) that because the Treasury agents failed to give him the warnings set forth in *Miranda* v. *Arizona*, 384 U.S. 436, his statements to the agents (and the fruits thereof) should have been suppressed on his pretrial motion. The trial court's denial of that motion, he argues, violated his privilege against self-incrimination and his right to counsel. This point, too, is without substance. The court below held (Pet. App. 23–24) that since petitioner was neither in custody, nor otherwise deprived of his freedom in any significant way, at the time he made the incriminating admissions the requirements of *Miranda* did not apply. This is in accord with the well-established rule in the Sixth Circuit, *United States* v. *Maius*, 378 F. 2d 716, 718–719, certiorari denied, 389 U.S. 905, and in seven other circuits, *Morgan* v. *United States*, 377 F. 2d 507, 508 (C.A. 1); *United States* v. *White*, 417 F. 2d 89 (C.A.

[6] Petitioner complains (Pet. 9–10) that the Department of Justice brought no proceedings against United States Senator Thomas Dodd for attempted evasion of his income tax, and argues that the publicized facts of the Dodd case are similar to the facts in petitioner's case. However, in the Dodd case the Department concluded that the proof available to it was insufficient to warrant seeking an indictment.

2), certiorari denied, 397 U.S. 912; *United States* v. *Mancuso,* 378 F. 2d 612, 619 (C.A. 4), certiorari denied, 390 U.S. 955; *Agoranos* v. *United States,* 409 F. 2d 833, 835 (C.A. 5), certiorari denied, 396 U.S. 824; *Cohen* v. *United States,* 405 F. 2d 34 (C.A. 8), certiorari denied, 394 U.S. 943; *Feichtmeir* v. *United States,* 389 F. 2d 498 (C.A. 9); *Hensley* v. *United States,* 406 F. 2d 481, 484 (C.A. 10).[7]

Petitioner asserts (Pet. 11–12), however, that these holdings, including the one in the case at bar, are in conflict with the Seventh Circuit's decision in *United States* v. *Dickerson,* 413 F. 2d 1111 (C.A. 7). In *Dickerson,* a prosecution for willful failure to file income tax returns, the court upheld a suppression order on the ground that the special agent had failed to give the *Miranda* warnings "at the inception of the first contact with the taxpayer after the case has been transferred to the Intelligence Division". *Id.* at 1117. The holding however, was expressly restricted to "interrogations taking place after the date of this decision", July 28, 1969. *Ibid.* Thus, even if the *Dickerson* rule were applied to the case at bar, the statements by petitioner, made during conversations with Treasury agents in 1964, would not be inadmissable.

Petitioner urges that the apparent conflict between the circuits on this issue warrants further review of the question by this Court. However, in view of the purely prospective nature of the *Dickerson* holding and the present policy of the Internal Revenue Service

[7] *Mathis* v. *United States,* 391 U.S. 1, furnishes no support for petitioner's contention. In that case, the defendant taxpayer was in custody during the interrogation by the Treasury agent.

to give virtually full *Miranda* warnings to all taxpayers when they are first interviewed by a special agent,[8] there should be few, if any, future cases which will meet a different fate in the Seventh Circuit than in any other circuit. See, *e.g., United States* v. *Campione,* 416 F.2d 486, certiorari denied, 397 U.S. 909.

3. Petitioner's argument (Pet. 14) that the trial court suggested in its instruction to the jury that petitioner was a taker of bribes is equally without merit. The instruction in question (Pet. 14–15; A.A. 339a–340a) simply informed the jury that if petitioner received funds from donors in consideration for past favors or preferment, or in the expectation or hope of future favors or preferment, such funds would constitute taxable income to him. Clearly, this was a correct statement of the law which contained no suggestion of bribery, and which, when read in the context of the instruction just preceding it (A.A. 338a–339a), was fair to petitioner. Moreover, petitioner made no objection to the instruction at trial, as required by Rule 30 of the Federal Rules of Criminal Procedure, and, in view of the finding below (Pet . App. 22) "that the jury was adequately in-

[8] By news release dated November 26, 1968, the Internal Revenue Service announced that henceforth a special agent on his first visit to a taxpayer must warn him of his constitutional rights, including the right to counsel, but not including the proffer of legal aid unless the taxpayer is in custody. The news release notes that this "new procedure goes beyond most legal requirements that are designed to advise persons of their rights." 1968 CCH Fed. Tax Reporter, par. 6946; 1968 Prentice-Hall Fed. Taxes, par. 55,476.

structed," his belated challenge here does not warrant further review.

Petitioner also points to several sentences spoken by the prosecutor during his lengthy summation (9 R. 5–18; 9 R. 54–78) and argues (Pet. 15) that these, too, unfairly suggested to the jury that petitioner was a recipient of bribes. Again, this assertion was not properly preserved for appellate review; there was no objection at trial. Cf. *United States* v. *Kravitz*, 281 F.2d 581 (C.A. 3), certiorari denied, 364 U.S. 941. Nevertheless, the court below evaluated the contention and held (Pet. 22) that, "the isolated portions of the summation now complained of * * * could not possibly have deprived [petitioner] of a fair trial."

CONCLUSION

For the foregoing reasons, it is submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted.

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